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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 427

WILLIAM H. BICKLEY, INDIVIDUALLY AND DOING BUSINESS AS BICKLEY'S AUTO EXPRESS,

Petitioner,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

H. EUGENE GARDNER,
Counsel for Petitioner.

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Petitioner,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, William H. Bickley, respectfully represents:

1. This is an action in Equity instituted by Bill of Complaint filed in the Common Pleas Court of Dauphin County, Pennsylvania, wherein your petitioner sought an order or injunction to restrain the above-named respondent, Pennsylvania Public Utility Commission, from interfering with operation of his business as a common carrier of goods, and from denying him his right to operate under the provisions of Article 3, Section 12 of The Public Service Company Law of Pennsylvania, commonly known as "The

Grandfather Clause", in the Act of July 26, 1914, P. L. 1374, of Pennsylvania, which reads in part as follows:

> "Every public service company shall be entitled to the full enjoyment and exercise of all and every, the rights, powers and privileges which it lawfully possesses or might possess at the time of the passage of this Act * * *"

2. In said Bill of Complaint, a copy of which appears on pages 3 to 15 of the printed record submitted herewith, your petitioner alleges that he is a citizen of the United States, that he resides at 424 Maple Avenue, Jenkintown, Pennsylvania, that for at least four years prior to July 26, 1913, he was engaged as a common carrier of property in Pennsylvania from the Delaware River on the east to the Susquehanna River on the west, and from the Mason and Dixon Line on the south to as far as ten miles north of United States Highway Route No. 22 on the north; that he had functioned as a common carrier of goods in said territory since at least four years prior to July 26, 1913, down to the present time; that in that time he built up said business, based upon dependable service, through his own efforts and through the efforts of others and through the investment of his money and earnings; that he built up his equipment and staff of employees and good will in the aforesaid period of time to take care of the requirements of shippers in the aforesaid territory; that after he had built up his equipment and personnel as aforesaid to service the aforesaid territory and after he had invested his money, earnings and efforts in said equipment, and after he had built up good will and a sizeable list of satisfied customers, the respondent herein notified your petitioner that it was curtailing his territory and limiting it to the small stretch or route between Philadelphia and Doylestown and intermediate points.

3. In his Bill of Complaint your petitioner further averred that he refused to accept said curtailment and took the position that such curtailment would deprive him of his rights under the Grandfather Clause in the Pennsylvania Public Service Company Law quoted in paragraph 1 of this petition; that such curtailment would limit the equipment he had built up to service the territory first referred to in paragraph 2 hereof to the much smaller territory later referred to in paragraph 2, thus rendering much of said equipment useless; and that such curtailment would destroy the good will your petitioner had built up over many years in the larger territory and would destroy his investment in the equipment he had, and would destroy his business—and the results of his efforts and labor—and would in effect give that business and good will and property to others without compensation to him for the taking.

4. In his Bill of Complaint your petitioner further averred that on May 13, 1936, and on June 11, 1936, before an Examiner of the respondent your petitioner and fourteen witnesses testified that he had conducted the aforesaid business as a common carrier for at least four years prior to July 26, 1913, and continuously since then, and there were no witnesses to the contrary, and yet, after operating for more than twenty years thereafter under said Grandfather Clause, the respondent ordered your petitioner to desist from said operation and to curtail his field of operation to the smaller territory.

5. Your petitioner has refused and still refuses to obey said order, contending that said order is illegal and unconstitutional in its operation; that said order denies him not only of his rights under the aforesaid Grandfather Clause in the Pennsylvania Public Service Company Law but takes from him his property and investment in that it requires him to use equipment built up for a larger terri-

tory in a smaller and more restricted territory and requires him to surrender his business and good will in the larger territory to others without compensation for such taking and without any good, sufficient and legal reason therefor. Ninety per cent of petitioner's business is the hauling of materials and equipment used in national defense.

6. That certain railroad and trucking interests have attempted to barge into the larger territory in which he operated long before they began to so operate, and your petitioner is informed, believes and therefore avers that said interests are in back of the aforesaid attempted denial of your petitioner's rights under the aforesaid law of Pennsylvania and under the Constitution of the United States.

7. That scores of satisfied shippers sought to join in the Bill of Complaint as evidenced by the Joinder on page 26 of the printed record submitted herewith, but the Common Pleas Court of Dauphin County, Pennsylvania, refused to permit them to so join. Most of these shippers aid national defense and depend upon the uncurtailed operation of your petitioner in so doing.

8. That your petitioner averred in his Bill of Complaint that the aforesaid order of the respondent not only deprived him of his rights under the Grandfather Clause aforesaid but was discriminatory in its operation and favored other carriers of goods not entitled to such favoritism, and if said order operated under the Pennsylvania Public Service Company Law, then that law, through the order, operated in such fashion as to deprive petitioner of his property without due process of law and in such fashion as to deny him the equal protection of the law.

9. That your petitioner, after alleging the foregoing facts in his Bill of Complaint, demanded Trial by Jury under Section 1111 of the Act of May 28, 1937, P. L. 1053, Article

XI, of the Commonwealth of Pennsylvania, as appears from Motion for Trial by Jury on page 40 of the printed record herewith, but the respondent filed Preliminary Objections to the Bill of Complaint (page 29 of the record filed herewith) alleging that the matter was res adjudicata and that the Commission (respondent herein) had decided in the proceeding in which your petitioner produced fourteen witnesses besides himself without contradiction that he had operated in larger territory as aforesaid that he nevertheless was not entitled to operate under the Grandfather Clause, even though he had so operated for more than twenty years, and even though the Commission (respondent herein) had permitted him to so operate and to build up his business and equipment without interference until the aforesaid railroads and trucking concerns decided to barge into your petitioner's field of operation.

10. That the Common Pleas Court of Dauphin County, Pennsylvania, denied your petitioner a hearing on his Bill of Complaint, and denied him his day in court, and denied him an opportunity to prove the facts above set forth, and denied him a Trial by Jury, and in its opinion dismissing the Bill of Complaint sustained the preliminary objection that the matter was res adjudicata.

11. The matter before the Common Pleas Court of Dauphin County, Pennsylvania, raised questions of fact and questions of law and constitutional questions as stated above which were not raised in the 1936 proceedings to curtail your petitioner's territory before the Pennsylvania Public Utility Commission (the respondent herein), and therefore said questions were not before the Superior Court of Pennsylvania when said proceedings were taken to said court in 1937 and in 1939 (See *Bickley* v. *Penna. Public Utility Commission*, 129 Pa. Superior Ct. 115 (1937) and *Bickley* v. *Penna. Public Utility Commission*, 135 Pa. Superior Ct.

490 (1939)). And if the record before the Pennsylvania Public Utility Commission and before the Superior Court of Pennsylvania was not brought into the Common Pleas Court of Dauphin County, your petitioner avers that said court had nothing before it on which to base its finding of res adjudicata. And certainly said record could not be offered in evidence unless the Common Pleas Court of Dauphin County allowed a hearing in which your petitioner would be given an opportunity to prove the facts alleged by him.

12. Your petitioner appealed to the Superior Court of Pennsylvania from the Decree of the Common Pleas Court of Dauphin County, Equity No. 1550, Commonwealth No. 1427, dismissing the Bill of Complaint.

13. In the Superior Court of Pennsylvania as of March Term 1942, No. 4, Harrisburg District, your petitioner contended that the Common Pleas Court of Dauphin County, Pennsylvania, erred in dismissing the Bill of Complaint, in sustaining the preliminary objection that the matter was res adjudicata without a hearing and without the record alleged to be res adjudicata before it and without an opportunity on the part of your petitioner to prove by testimony and evidence the contrary to be true, and in not giving your petitioner a hearing or day in court or opportunity to show that the order of the respondent herein was discriminatory and confiscatory and that it violated your petitioner's rights under the Grandfather Clause of the Pennsylvania Public Service Company Law and his right to not have his territory, business and good will and equipment and investment therein taken without compensation, without trial by jury and without due process of law. These contentions of your petitioner in the Superior Court of Pennsylvania appear in the Statement of Questions Involved appearing on pages 1 and 2 of the printed

brief of your petitioner used in the Superior Court of Pennsylvania and filed herewith (R. 54-55) and in the Assignments of Error appearing on pages 6, 7 and 8 of said printed brief (R. 67-69).

14. The Superior Court of Pennsylvania decided against your petitioner, and held that the order of respondent was not discriminatory and not confiscatory and not in violation of his rights under Pennsylvania Law and under the Federal Constitution as referred to above. So decided April 15, 1942.

15. Your petitioner avers that said decision of the Superior Court of Pennsylvania was not in line with its decision in the *Hostetter* case in 110 Penna. Superior Court 212 in which rights under the Grandfather Clause of the Pennsylvania Public Utility Law were also involved.

16. Your petitioner then petitioned the Supreme Court of Pennsylvania for the allowance of an appeal thereto from the Superior Court of Pennsylvania, which appeal was refused on June 29, 1942.

17. By reason of the foregoing your petitioner avers that he is not only denied his rights as a common carrier under the Grandfather Clause of the Public Service Company Law of the Commonwealth of Pennsylvania of July 26, 1914, P. L. 1374, and his right to hearing or trial, either with or without jury, under the Section 1111 of the Act of May 28, 1937, P. L. 1053, Article XI, of the Commonwealth of Pennsylvania, but also is denied the equal protection of the laws of the Commonwealth of Pennsylvania, and has his property taken from him, and his territory, business and good will and investment, by a confiscatory and discriminatory order, without compensation for such taking and without due process and without trial by jury, contrary to

the provisions of Amendment XIV, Section 1, to the Constitution of the United States of America, which reads, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

and avers that in this case there is by reason of an order of the respondent, allegedly made under a law of the Commonwealth of Pennsylvania, as much confiscation, discrimination and taking of property without compensation and without due process as existed in the case of *Hill Military Academy and Catholic Sisters* v. *Pierce, Governor of Oregon,* 268 U. S. 510 (1924), in which your Honorable Court held a law of the State of Oregon operating in such fashion unconstitutional.

WHEREFORE, your petitioner, believing that an injustice has been done, and that he has been discriminated against and that his property and investment and business and good will are being taken without compensation and without due process, and that the errors referred to above affect his constitutional and substantive rights, and that the conclusions reached were both unjust and wrong, and that the case should be returned to the Pennsylvania Courts for hearing or for trial by jury and with the process to which he is entitled, prays your Honorable Court that a writ of certiorari issue under the seal of your Honorable Court, directed to the Superior Court of Pennsylvania commanding said Court to certify and send to your Honorable Court a full and complete transcript of the record and of the proceedings of the said Common Pleas Court of Dauphin County, Pennsylvania, had in the case numbered and en-

titled William H. Bickley, individually and doing business as Bickley's Auto Express, Complainant, *vs.* Pennsylvania Public Utility Commission, Respondent, Equity No. 1550, Commonwealth No. 1427, and No. 4, Superior Court, Harrisburg District, March Term 1942, to the end that this case may be reviewed and determined by your Honorable Court as provided for by the Constitution and Statutes of the United States, and that the decree of said Common Pleas Court of Dauphin County, Pennsylvania, and the Superior Court of Pennsylvania, may be reversed by your Honorable Court and/or said case returned for hearing or for trial by jury, and for such further relief as to your Honorable Court may seem proper.

WILLIAM H. BICKLEY.

Dated: September 25, 1942.

STATE OF PENNSYLVANIA,
County of Montgomery, ss:

William H. Bickley, being duly sworn according to law, deposes and says that he is the above-named petitioner, complainant and appellant, and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

WILLIAM H. BICKLEY.

Sworn to and subscribed before me this 25th day of September, A. D. 1942.

E. NELSON WEIR,
Notary Public.

[SEAL.]

My commission expires May 21, 1943.

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Supreme Court of the United States

October Term, 1942

No. 427

WILLIAM H. BICKLEY, Individually and Doing Business as BICKLEY'S AUTO EXPRESS,

Petitioner,

vs.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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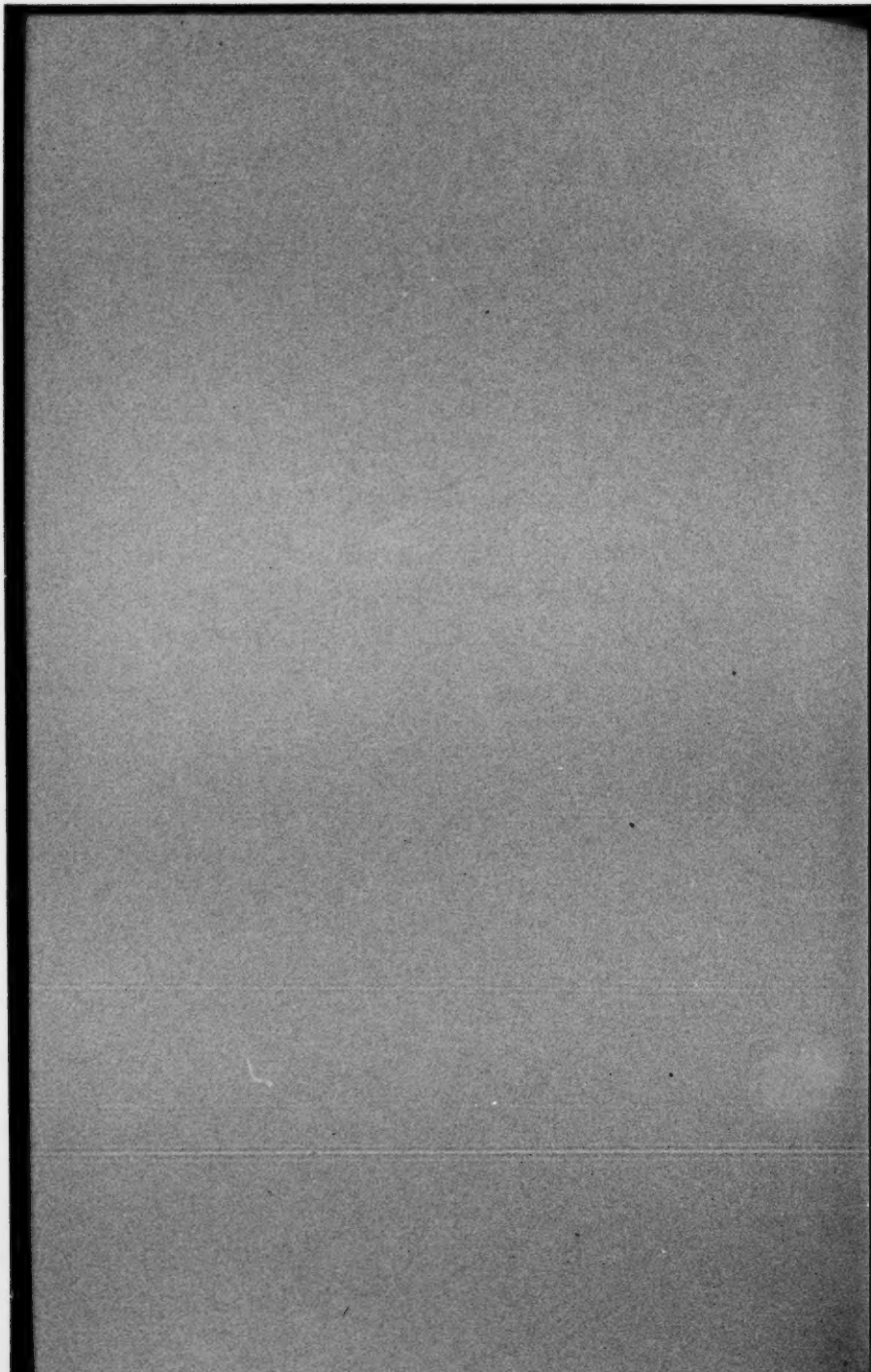

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OPINION OF THE COURT BELOW

The opinion of the Superior Court of Pennsylvania may be found in the Record in this case at page 69. It is officially reported in 148 Pa. Superior Ct. 399; 25 Atl. (2nd) 589 and printed as an appendix hereto.

ARGUMENT

I.

GENERAL

The Petition for Writ of Certiorari filed by William H. Bickley, does not contain a summary and short statement of the matters involved; does not contain a statement particularly disclosing the basis upon which it is contended that the Honorable Court has jurisdiction to review the decision in question (Rule 12, par. 1); does not present the questions involved, and sets forth no specific reasons relied on for the allowance of the writ (Rule 38, par. 2).

Petitioners failure to do this places respondent under the disability of being unable to categorically oppose the merits of the petition. Consequently, we delineate an opposition only to those portions of the petition deemed cogent by the exigencies of the case.

The opinion of the court below in *Bickley, Appt., v. Pennsylvania Public Utility Commission*, 148 Pa. Superior Ct. 399; 25 A 2d 589, not only concisely depicts the historical facts involved, but also sets forth the applicable law. The opinion, upon which respondent desires to submit its case, is printed in toto as an appendix hereto.

II.

THE ISSUES PURSUED BY PETITIONER ARE RES JUDICATA

Petitioners former appeal, taken seasonably under the appropriate provisions of the Public Utility Law of Pennsylvania, 1937 P. L. 1053; 66 P. S. 1101 et seq, from the order of the Pennsylvania Public Utility Commission, raised all the

pertinent issues involved in an appeal from the order of an administrative tribunal.

On April 28, 1939, the Superior Court of Pennsylvania affirmed the order of the Commission in *Bickley, Appelant, v. Pennsylvania Public Utility Commission,* 135 Pa. Superior Ct. 490; 5 Atl. 2d 806. On October 1, 1940, Petitioner filed a Bill in the Court of Common Pleas of Dauphin County sitting In Equity seeking to enjoin enforcement of the Commission's Order which had been affirmed by the Superior Court at the above citation. His bill was dismissed upon preliminary objections thereto and he again appealed to the Superior Court in that decision. In the opinion of the Superior Court therein (See Appendix) the Court affirmed the decree of the Dauphin County Court on the ground, inter alia, that the case was res judicata as exemplified on the face of the bill.

The well founded doctrine of res judicata or estoppel by judgment proceeds on the theory that a party litigant or his privies cannot raise again issues of the law or fact that have been once determined on the merits by a court of competent jurisdiction. See *Sunshine Coal Co. v. Adkins,* 310 U. S. 381; 84 L. Ed. 1263; *U. S. v. California Bridge and Construction Company,* 245 U. S. 337; 62 L. Ed. 333 and cases cited.

Petitioner's application to the Supreme Court of Pennsylvania for the allowance of an appeal from the ruling of the Superior Court was denied per curiam without written opinion. (Record, p. 81) The absence of an opinion by the Supreme Court does not affect the quality of its decision or detract from its efficiency as a judgment upon the questions presented and its subsequent conclusive effect upon the rights of the petitioner. *Napa Valley Electric Company v. Railroad Commission of California,* 251 U. S. 366.

III.

PETITIONER CANNOT NOW RAISE QUESTIONS OF LAW OR FACT WHICH WERE AVAILABLE TO HIM, BUT WHICH HE NEGLECTED TO RAISE IN THE COURT BELOW.

In paragraph 11 of the Petition for Writ of Certiorari, petitioner contends for favorable discretionary action by this Honorable Court on the ground that the matter in equity " * * * raised questions of fact and questions of law and constitutional questions as stated above which were not raised in the 1936 proceedings * * * ". Petitioner alleged below that the principles of res judicata cannot apply because his former counsel failed to raise the constitutional questions in the cases before the Superior Court (Record, pp. 37, 47). It should be noted that the so called "1936 proceedings" involved the propriety of the order of the Pennsylvania Public Utility Commission, and that petitioner took an appeal from that order to the Superior Court of Pennsylvania. Petitioner therefore, had his day in court with ample opportunity to present *all* questions of law, fact or constitutionality. By asserting them now, he is attempting to arrogate the principles of res judicata which extend not only to those issues which were actually adjudicated, but also to those which might have been raised, *Grubb v. Public Utility Commission*, 281 U. S. 470. In that case closely analagous to the case at bar, Justice Van Devanter said at pages 478 and 479:

> The thing presented for adjudication in the case in the state courts was the validity of the order, and it was incumbent on the appellant to present in support of his assserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein v. New Orleans*, 177, U. S. 390, 398, *et seq.; United States v. California and Oregon Land Co.*, 192 U. S. 355, 358.

"As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316, 319; *United States v. Moser*, 266 U. S. 236, 241; *Cromwell v. County of Sac*, 94 U. S. 351, 352."

IV.

PETITIONER HAS VIOLATED THE MAXIM THAT A LITIGANT MUST COME INTO EQUITY WITH CLEAN HANDS.

In paragraph 5 of Petition for Writ of Certiorari, William H. Bickley boldly admits that he had violated, and still continues to violate the Commission Order, the effect of which he sought to restrain. His language is as follows: "Your petitioner has refused, and still refuses to obey said order contending that said order is illegal and unconstitutional in its operation * * * ".

The tenet that he who comes into equity must come with clean hands contemplates inaction rather than action on the part of the court, and means that equity will refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the manner in which he seeks relief. See *Danciger v. Stone*, 187 Fed. 853; *American Insurance Company v. Lucas*, 38 Fed. Supp. 926.

CONCLUSION

It has been demonstrated that for the foregoing reasons viewed in conjunction with the complete opinion of the court below, set forth in the appendix hereto, that under the law and the facts we respectfully urge your Honorable Court to deny the prayer of the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

BICKLEY, APPELLANT, v. PENNSYLVANIA PUBLIC UTILITY COMMISSION

148 Pa. Superior Ct. 399 (1942)

OPINION BY KELLER, P. J., April 15, 1942:

In 1936, William H. Bickley, trading as Bickley's Auto Express, filed two applications with the Public Service Commission. The one asked for a *renewal* of the certificate of public convenience issued at A26187, Folder No. 1, evidencing the commission's approval of his right to operate motor vehicles *as set forth and limited* in said certificate. The other asked for registration as a common carrier of property, (pursuant to regulations established by the commission) under section 12 Article III, of the Public Service Company Act of July 26, 1913, P. L. 1374, sometimes known as the Grandfather clause.

The commission renewed the certificate of public convenience, but refused his application for registration as a common carrier. He appealed to this court. See 129 Pa. Superior Ct. 115, 195 A. 162.

As it appeared from the record, and was admitted by counsel for the commission, that Bickley had been engaged as a common carrier of property prior to the passage of the Public Service Company Act and had continued to exercise certain of those rights since then, we sustained the appeal and remanded the record to the commission with directions to make specific findings as to (1) the rights, powers and privileges, as a common carrier of property, possessed, enjoyed and exercised by appellant on July 26, 1913 when the Public Service Company Act was passed; and (2) the rights, powers and privileges so possessed and enjoyed which he continued to exercise to the date of filing his application for registration as a common carrier of property; and that a

certificate of registration be issued him as a common carrier of property in conformity with said findings. This was in accordance with the rulings of this court in prior cases, where we held that the Grandfather clause, supra, protected the carrier only as respects the particular business—its character, field, operation, etc.—it was engaged in and carried on when the Public Service Company Act was passed, and had continued to exercise and carry on since that date. See *City Transfer Co. v. P. S. C.*, 93 Pa. Superior Ct. 210; *Hostetter v. P. S. C.*, 110 Pa. Superior Ct. 212, 168 A. 493; *Mullin's Express v. P. S. C.*, 113 Pa. Superior Ct. 212, 172 A. 486; *Whinney v. P. S. C.*, 116 Pa. Superior Ct. 472, 176 A. 753. And that it was the province of the Public Service Commission to determine the facts as to the character, field, operation, etc., of the business so carried on by the common carrier, whose rights, privileges and powers therein were preserved to him by section 12 of Article III aforesaid. Those cases hold that the fact that a person may have acted as a common carrier, in a limited territory or for a restricted purpose, prior to July 26, 1913, did not confer on him the right to conduct the business of a common carrier generally and all over the state of Pennsylvania after that date, without the approval of the Public Service Commission. Cf. *United States v. Maher*, 307 U. S. 148; *Alton R. R. Co. v. United States*, 315 U. S. 15; *United States et al. v. Carolina Freight Carriers Corp.*, 315 U. S. 475; *Howard Hall Co., Inc. v. United States et al.*, 315 U. S. 495, dealing with the "Grandfather clause" (#206(a)) of the Federal Motor Carrier Act of 1935, 49 Stat. 543, 551, 49 U. S. Code, #306.

The record having been remanded to the commission was considered by it and a report was filed in which the commission found that William H. Bickley was entitled to *registration* covering the following rights as a common carrier, based upon the rights, powers and privileges which were exercised by him as of the passage of the Public Service Company Act, to-wit: "Transportation of property, including household goods in use, as a Class D carrier, between points in the city and county of Philadelphia; transportation of property, as a Class

D carrier, from points in the city and county of Philadelphia to Doylestown, New Hope and Warrington, Bucks County, and Jenkintown, Willow Grove, Hatboro, White Marsh, Ambler, and Lansdale, Montgomery County, and vice versa, excluding intermediate points; transportation of household goods in use, as a Class D carrier, from points in the city and county of Philadelphia and the borough of Jenkintown, Montgomery County, to points in Pennsylvania, and vice versa; all transportation limited and restricted to the operation of 8 motor trucks, the total maximum gross weight of which, with loads, shall not exceed 144,000 pounds, as named and described in the equipment certificate."

He appealed from this order to this court, assigning the refusal of the commission to grant him full and unlimited registration. See 135 Pa. Superior Ct. 490, 5 A. 2d 806. We affirmed the order on April 28, 1939, holding that the order was not only supported by sufficient competent evidence in the record, but also that it was in accordance with his own evidence as to the field, scope and operation of his business when he originally applied in 1933 for certificate of public convenience. See 135 Pa. Superior Ct. 490, 497, 5 A. 2d 806, and *Beatty v. P. S. C.*, 110 Pa. Superior Ct. 461, 169, A. 21. He did not ask for the allowance of an appeal to the Supreme Court of this Commonwealth or to Supreme Court of the United States.

On October 1, 1940, a year and five months after our judgment was entered, he filed a bill in the court of Common Pleas of Dauphin County, sitting in equity, setting forth that he had been engaged in business as a common carrier for four years prior to July 26, 1913; that on February 6, 1936 he had filed with the Public Service Commission—now the Pennsylvania Public Utility Commission—a petition for the registration of the rights, powers and privileges which he claimed he possessed under the provisions of Article III, section 12, of the Public Service Company Act. He described in his bill the course of, and various steps taken in, that proceeding, including the appeals to this court, reported in 129 Pa.

Superior Ct. 115, 195 A. 162, and 135 Pa. Superior Ct. 490, 5 A 2d 806, and the final judgment, unappealed from, of this court. He averred that the final order of the commission was erroneous and that this court erred in accepting the finding of the commission as a fact finding body; that, depending upon his counsel, who then represented him before this court, he, the complainant "erred in not taking an appeal from its decision affirming the decision of the commission."

He also averred: "19. That notwithstanding the aforesaid decisions by the Commission and by the Superior Court of the Commonwealth of Pennsylvania, Complainant continued to operate and still continues to operate as a common carrier of property not only between points in Philadelphia, Montgomery and Bucks Counties, but also between said points and other points in other counties throughout the Commonwealth of Pennsylvania.

"20. That the Pennsylvania Public Utility Commission has made an order upon him to desist from serving shippers between Philadelphia, Easton, Allentown and Bethlehem and all other intermediate points, and has notified shippers between said points to desist from using complainant's services or be subject to severe penalties", a copy of which notice was annexed to the bill.

He further averred that the order of the commission limiting his registration as a common carrier and restricting his operations as such, deprived him of the full enjoyment and exercise of the rights, powers and privileges he possessed at the passage of the Public Service Company Law of July 26, 1913, and also of his rights, privileges and immunities as a citizen of the United States, contrary to the 14th Amendment of the Constitution of the United States.

He prayed for the issuance of an injunction annulling the order of the commission and enjoining it from further interfering with, denying or abridging the full enjoyment and

exercise of his right to operate as a common carrier throughout the Commonwealth of Pennsylvania.

The commission filed preliminary objections to the bill, on the ground, inter alia, that upon the facts averred in the Bill of Complaint, complainant was not entitled to any relief, for the reason that the bill on its face showed that the Superior Court had already judicially reviewed the order of the commission and had adjudicated the legal questions raised in the bill against the contentions set forth therein by the complainant, and that no appeal from the decision of the Superior Court had been taken within the time provided by law, and the same has not been reversed, vacated or set aside, and is therefore res judicata.

The court sustained the preliminary objections filed by the commission and dismissed the bill.

Complainant appealed to this court.

The opinion by President Judge HARGEST, reported in 50 Dauphin County Reports 259, fully justifies the decree appealed from. It may be summarized as follows:

1. The question of res judicata, in view of the averments in the bill, was properly raised under Equity Rule 48; citing *Long v. Metzger*, 301 Pa. 449, 455, 152 A. 572; *Christy v. State Board of Education*, 339 Pa. 65, 14 A. 2d 292; *Kowatch v. Home B. & L. Assn.*, 131 Pa. Superior Ct. 517, 200 A. 111. See also, *Penn-O-Tex Oil & Leasehold Co. v. Big Four Oil & Gas Co.*, 298 Pa. 215, 148 A. 92; *Schlichtman v. Crawford et al.*, 337 Pa. 497, 499, 12 A. 2d 52; *Shotkin v. Presbyterian Board*, 343 Pa. 650, 23 A. 2d 419; and the record of those proceedings, so referred to in the bill, showed that the alleged rights of the complainant to operate as a common carrier, under section 12 of Article III of the Public Service Company Law, had been adjudicated and judicially fixed and determined therein.

2. When issues have been adjudicated upon the facts, between the same parties, the case is concluded not only as to the questions raised but as to all questions which might properly have been raised and passed upon. Citing *Hochman v. Mortgage Finance Corp.*, 289 Pa. 260, 263-265, 137 A. 252; *Wallace's Est.*, 316 Pa. 148, 153, 174 A. 397; *Detwiler v. Williamsburg Bor.*, 116 Pa. Superior Ct. 21, 176 A. 244.

3. Failure to raise a constitutional question at the prior hearing or trial will not support a new action by the losing party upon precisely the same state of facts.

4. Having pursued the statutory remedy by appeal to the courts given him by section 1101 of the Public Utility Law, and lost, and not having availed himself of further appeals under section 1109, he cannot ask for an injunction, under section 1111, to restrain the enforcement of an order which was duly affirmed on appeal by this court. The policy of the law of this Commonwealth is to restrict the litigant to the statutory remedy where one is given. Citing *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 23, 24, 1 A. 2d 775; *Taylor v. Moore*, 303 Pa. 469, 474, 154 A. 799. See also, *White v. Old York Road Country Club*, 318 Pa. 346, 178 A. 3; *Ermine v. Frankel*, 322 Pa. 70, 185, A. 269.

He might have added the further reason, that one who comes into equity must come with clean hands; that a complainant who, in his bill, asserts his continued intentional violation of an order of the Public Service Commission, duly affirmed by this court, is in no position to ask for equitable relief from its enforcement.

The assignments of error are overruled and the decree is affirmed at the costs of the appellant.

End